No. 96-1143

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

LEAMINDA COKER,

*Petitioner,*

*vs.*

JAMES P. DOUGLAS, A. A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, and CHARLES MELTON, Individually and as Trustees of the IBEW PENSION TRUST FUND LOCAL 716, and IBEW PENSION TRUST FUND LOCAL 716, and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716,

*Respondents.*

*On Petition for Writ of Certiorari to the Court of Appeals for the Fourth Judicial District, Bexar County, Texas*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Respondents object to the initial question articulated by Petitioner — *i.e.*, whether standing to enforce ERISA is a prerequisite to ERISA preemption — because it was never raised or decided below *and* because it is premised on Petitioner's mere assumption that she lacks standing to enforce the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

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Respondents James P. Douglas, A. A. Cook, Ray Williams, George Sumrow, Clifford Henderson, Charles Melton, IBEW Pension Trust Fund Local 716, and IBEW, Local Union 716 oppose Leaminda Coker's Petition for Writ of Certiorari as follows:

## STATEMENT OF THE CASE

Contrary to Petitioner's sole contention, this case has never involved the issue of "whether standing to enforce ERISA is a prerequisite to ERISA preemption." Petitioner never argued, or even articulated, such an issue before either the Texas state trial court or the Texas Court of Appeals — the only judicial entities that have comprehensively analyzed the application of ERISA preemption to her claims. Although Petitioner subsequently attempted to assert radically different facts and legal theories in her Application for Writ of Error to the Texas Supreme Court, it is clear that she was estopped from the former, and had waived the latter. It logically follows, therefore, that none of those courts ever considered or ruled upon the questions she purports to bring before this Court. Petitioner misleads this Court by asserting otherwise.

Furthermore, the "important question" posed by Petitioner is purely academic in this case, representative of no genuine material dispute or controversy, because, even if she had properly raised it below, its answer would have been irrelevant to the disposition of her claims. Briefly stated, whether or not standing under ERISA is a prerequisite to ERISA preemption, the unanimous consensus of appellate courts that have analyzed identical claims by plaintiffs who, like Petitioner, were fiduciaries under an ERISA pension plan, is that such plaintiffs do, indeed, enjoy standing to bring such claims under ERISA.

## A. Statement of Facts

The IBEW Pension Trust Fund ("the Plan") is an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), established jointly by IBEW Local Union 716 ("the Union") and the South Texas Chapter of the National Electrical Contractors' Association ("the Association"), pursuant to § 302c of the Labor Management Reporting Act, to provide retirement income and related services for electricians covered by collective bargaining agreements. (Sup. Tr. 25-26). *See also* 29 U.S.C. § 1002(2). Such collective bargaining agreements are the products of negotiation between electrical contractors in the Association and the Union, the exclusive bargaining representative of covered electricians. Under the Plan, contractors employing covered electricians make direct contributions, as part of the electricians' compensation, to the Plan and such cumulative contributions, along with whatever income they may earn, are maintained in the individual account of each Plan participant.[1] (Sup. Tr. 48-49).

Petitioner was employed by the Plan on October 19, 1981, and continued her employment until April 19, 1989, when she was discharged. (Tr. 913-15). At the time of her discharge, Petitioner was the Administrator of the Plan, subject to supervisory control by the Trustees. (*Id.*). Her duties included administering loans permissible under the Plan to qualified Plan participants. (Sup. Tr. 919-20). Loans contemplated by the Plan included so-called "hardship unemployment" loans, which were drawn — at the participant's request — from monies deposited in the Plan on behalf of the participant in his or her individual

1. As indicated above, the Plan participants are the electricians covered by the collective agreements between the Association and the Union. The terms "Plan participants" and "covered electricians" are used interchangeably, depending on the context.

account. All such loans were to be made according to the rules and regulations governing the Plan. (*Id.*).

In her lawsuit filed in the state district court of Harris County, Texas, in 1990, Petitioner claimed that, shortly before her discharge on April 19, 1989, and in her capacity as the Administrator of the Plan, she discovered that the Trustees were approving and recommending loans from the Plan to participants who, according to Petitioner, were not eligible to receive them under the applicable rules and regulations governing the Plan. (Tr. 920-22). It is undisputed that these allegedly improper loans were made to Plan participants solely from their own personal accounts. (Sup. Tr. 48-49). Petitioner further alleged in her Original Petition that she refused to continue processing those loans, after which she, as the person "in charge of administering" the Plan, was then wrongfully discharged for her refusal to perform acts which she claimed violated the terms of the governing Plan document and which, she claimed, would have exposed her to criminal penalties. (*Id.*) (*See* Original Petition, 3) .

Thus pled, Petitioner's allegations purported to state a wrongful discharge claim against the Plan and its individual Trustees under *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W. 2d 733 (Tex. 1985), in which the Texas Supreme Court had recognized a cause of action for one who claims that she was discharged for refusing to perform an unlawful act for which she would have been exposed to criminal penalties. Petitioner added other causes of action for intentional infliction of emotional distress, breach of employment contract, and civil conspiracy — all centered as well on her discharge. Petitioner also alleged that "[the] Union, through its duly authorized agent, wrongfully and illegally certified the ineligible loans" and claimed that the Trustees and the Plan itself were acting in concert and conspiring with the Union in terminating her employment. (Tr. 922-25).

**B. Pertinent Procedural History**

Petitioner filed this lawsuit in 1990. Following extensive discovery and other pre-trial activity, all Defendants/ Respondents moved for summary judgment in July, 1993, arguing that Petitioner's state law claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*— both because they were directly related to the Pension Plan and because they would ultimately require an analysis and evaluation of a fiduciary's duties under the Plan. In response to Defendants' motion, Plaintiff/Petitioner argued simply, though repeatedly, that her claims arose solely under state law, were brought against the Plan and the Trustees only in their capacity as her employer, and did not "relate to" the Plan. At no time did she claim that she lacked standing to bring a claim under ERISA and that, therefore, ERISA preemption should not apply to her claims.

On April 29, 1994, after extensive additional briefing and argument by all parties, the District Court of Harris County, Texas, 164th Judicial District, granted the motion for summary judgment by all Respondents except the Union as to all of Petitioner's claims, expressly holding that her claims for wrongful discharge, breach of contract, and civil conspiracy are preempted by ERISA and that, as a matter of law, none of the conduct she alleged in support of her emotional distress claim was extreme or outrageous. On October 31, 1994, the court similarly granted summary judgment to the Union.

Following the entry of summary judgment against Petitioner, she appealed to the Texas Court of Appeals. In both her principal brief and her reply brief, Petitioner articulated — with one exception[2] — the same arguments she had advanced before the

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2. In her reply brief before the court of appeals, Petitioner suggested, (Cont'd)

trial court. Once again, she did not argue that she lacked standing to bring her action under ERISA. Consequently, the court of appeals did not address that issue or, of course, the logical related issue of whether standing under ERISA is a prerequisite for ERISA preemption.[3]

Following the court of appeals' denial of her petition for rehearing, Petitioner applied to the Texas Supreme Court for Writ of Error. Despite her "creative" new arguments that she was never a plan fiduciary, and her repeated argument that she had pled "no cause of action" under ERISA's enforcement provisions, the court denied her application.

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(Cont'd)

for the first time in this litigation, that Respondents had failed to establish that she was the Administrator of the Plan — that is, failed to establish that she was a fiduciary governed by ERISA. In apparent recognition of Petitioner's failure to have raised this issue previously, and mindful that her entire lawsuit had centered from the beginning on her claim that she had refused to perform certain acts that would have allegedly consituted a criminal breach of her fiduciary duties, the court of appeals quite rightly disregarded that contention, concluding that Respondents' proof had met the high standard for obtaining summary judgment in Texas courts.

3. Petitioner admits (Petition for Certiorari, 6) that the court of appeals "did not address" a standing issue, but misleads this Court about having ever presented it. Although she now claims (*Id.*), that she argued "that she had no standing to enforce [her] claims under [ERISA]," her only citation to any such purported contention establishes merely that she argued before the court of appeals — in her petition for rehearing — and in her Application for Writ of Error to the Texas Supreme Court, that preemption was improper simply because she had not articulated a claim for benefits under the Plan. (*Id.*, and at Appendix to Petition, 23a, 26a, 33a, 37a-38a).

## REASONS FOR DENYING THE WRIT

## SUMMARY OF THE ARGUMENT

This case presents no issue warranting this Court's consideration. Petitioner has identified no disagreement among the circuit courts of appeals with respect to the questions she seeks to bring before the Court, nor any conflict between a decision of this Court and that of any other. Indeed, on the precise threshold issue she presents — whether standing to enforce ERISA is a prerequisite to ERISA preemption — Petitioner cannot even demonstrate that a decision of any kind has been rendered in this case, precisely because that issue was never presented and preserved below.

Furthermore, even if the issue Petitioner now articulates had been addressed to, and adjudicated by, the courts below, nothing in any prior decision or ruling in this case suggests that it was necessarily decided against Petitioner. Apparently understanding that the "important questions" she asks this Court to answer are purely academic if she, in fact, has standing under ERISA, Petitioner attempts to skirt this fundamental threshold issue by her mere assertion that she lacks such standing. That assertion is based on her similarly bare contention that she was not an ERISA plan fiduciary and that, therefore, she did not enjoy a fiduciary's right to proceed under 29 U.S.C. § 1132. She does not, however — indeed, she cannot — identify any decision below reaching such a conclusion, which is, logically, a necessary (but unarticulated) premise to the "important question" she seeks to impose upon this Court.

In fact, the most reasonable reading of the decisions below is that the Texas courts found that Petitioner was an ERISA fiduciary, and, consequently, would have found — had the issue been presented to them — that she had all the rights and

responsibilities accompanying that status. Stated another way, because the Texas courts were obviously satisfied that Respondents had established — consistent with the burdens of proof for Texas summary judgments — that Petitioner was a fiduciary of the Plan, their most likely conclusion (one can do nothing other than project an "educated guess" on this point since Petitioner never properly presented the questions she brings here) would have been that she had standing under ERISA. Moreover, that decision would have been consistent, rather than in conflict, with the Ninth Circuit Court of Appeals, the only court on whose decisions about standing and preemption Petitioner relies.[4]

## ARGUMENT

Petitioner's Petition for Certiorari should be denied. She has identified no conflict or disagreement between or among circuit courts of appeals, between a decision by this Court and a decision by any other, or between any circuit court of appeals and a state court of last resort. Instead, Petitioner asserts that this case presents the "important question of whether standing to sue under ERISA is a prerequisite to both subject matter jurisdiction and ERISA preemption." (Petition for Certiorari, 13). Such an assertion is incorrect and misleads the Court.

Whatever the proper answer may be to Petitioner's "important question," this case simply does not ask it. None of

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4. In support of her argument that ERISA preemption should not apply to the claims of a plaintiff who lacks standing to sue under ERISA, Petitioner cites to *Curtis v. Nevada Bonding Corporation*, 53 F.3d 1023 (9th Cir. 1995) and *Harris v. Provident Life and Accident Insurance Co.*, 26 F.3d 930 (9th Cir. 1994). As is more fully set forth below, however, the Ninth Circuit has also held, on facts materially indistinguishable from those in this case, that a plaintiff such as Petitioner does, indeed, enjoy standing to proceed under ERISA. *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993).

the Texas courts below rendered any decision on this purported question, undoubtedly because it was never articulated or argued before them. The trial court's summary judgment for Respondents is silent on any such issue, and a careful review of Petitioner's voluminous filings preceding the judgment uncovers no such contention.

Similarly, the decision of the Texas Fourth Court of Appeals, affirming the trial court's judgment, makes no mention of — and, obviously, does not address — any issue concerning "whether standing to sue under ERISA is a prerequisite to both subject matter jurisdiction and ERISA preemption." Once again, Petitioner's principal and reply briefs before the Fourth Court presented no such issue, nor did her petition for rehearing. Finally, in her Application for Writ of Error to the Texas Supreme Court, Petitioner did not raise or argue the contention that ERISA preemption should not apply to claims by a plaintiff who (allegedly) lacks standing to bring an action under ERISA.[5]

It is hardly surprising that neither Texas appellate court addressed this issue, since it was not specifically raised before either, or raised and preserved in antecedent proceedings. Petitioner now apparently seeks to circumvent the state appellate processes, and to be excused for the failure to raise it therein, by asking this Court to address an issue about which no presently identifiable dispute exists — indeed, about which, in this case, no identifiable decision has even been reached.

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5. A careful reading of the Petition for Certiorari further demonstrates the point. Although Petitioner repeatedly implies that the lower courts erred in concluding that ERISA preemption applies even to plaintiffs with no standing to sue under ERISA, she cites to no opinion or decision of any court below articulating such a conclusion. In fact, she identifies no opinion or decision containing any language that suggests that such an issue was even before any of the lower courts. Not coincidentally — and not surprisingly — Petitioner also cites to no pleading, brief, or other filing below in which she herself ever raised the issue.

Petitioner's attempt to seek review by this Court of an "important question" not presented or adjudicated in previous proceedings in this case is all the more objectionable because she has never adequately presented the necessary threshold question: whether she, as an ERISA plan administrator, has standing under ERISA to sue other plan fiduciaries to prevent alleged violations of the Plan, or to redress alleged retaliation against her for allegedly opposing such violations. Because Petitioner has never asked any lower court this question, she merely assumes that she lacks such standing and now asks this Court to grant certiorari to review both her assumption and the brand-new "important questions" she seeks to erect upon it. No other explanation of her petition is possible, since, just as she never previously raised the issue of whether standing to enforce ERISA is a prerequisite for preemption, she also never presented the related question of whether she, in fact, has such standing.

The closest Petitioner has ever come to raising either of these points occurred well after the trial court's summary judgment, in the late stages of her appeal before the Texas Fourth Court of Appeals. After having litigated this case for five years with one central premise — *i.e.*, that she was a fiduciary of the IBEW Pension Plan who was allegedly discharged for refusing to process allegedly unlawful loans under the Plan — Petitioner attempted, for the first time, in her ***reply*** brief before the court of appeals, to deny that she ever held any such fiduciary position under the Plan. Apparently, Petitioner hoped that this dramatic reversal of position would insulate her from ERISA preemption, just as she now relies on it in attempting to mislead this Court into granting further review. At oral argument before the court of appeals, Respondents challenged Petitioner's egregious attempt to repudiate her own underlying factual allegations, and the subsequent decision of the court of appeals implicitly rejected her transparent flip-flop on this point. Once again, however, before this Court, and in a poorly concealed attempt

to bootstrap her way to the "important question" she now poses for review, she brazenly contradicts the fundamental fact upon which her claims have always been based.

Petitioner labors very carefully to avoid the contradiction, never mentioning that her lawsuit has always been premised on her claim that she was discharged because she allegedly refused to perform acts that would have allegedly exposed her to criminal penalties for breach of her fiduciary duties. It is apparently her view that by blithely asserting now that she was ***not*** a plan fiduciary, and by thereafter positing that, as a result, she has no standing to enforce ERISA, she can then pursue her argument that, because she has no such standing, her claims cannot be preempted by ERISA. As stated above, Petitioner never raised the issues of whether she has standing to sue under ERISA and, if she does not, whether ERISA preemption can be a valid defense to her claims. Lest this Court be tempted to consider Petitioner's "important question" on the strength of her bare assertion that she had no standing under ERISA, however, a brief review of Petitioner's actual claims should be of assistance.

In her Original Petition, filed in April 1990, Petitioner's first cause of action alleged that, having "worked her way up to a top position [and] becoming the Administrator of the IBEW Trust Fund," her duties included the "administering of loans from [the Fund] to eligible borrowers, according to the rules and regulations governing the [Fund]." (Plaintiff's Original Petition) Petitioner further alleged that she subsequently determined that loans were being made under circumstances not contemplated by the Plan — which, according to her, made them unlawful — and that when she, as the person "in charge of administering" the Plan, allegedly refused to continue processing such loans, she was discharged. (*Id.*). Thus pled, Coker's allegations purported to state a Texas common law wrongful discharge claim under *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W. 2d 733 (Tex. 1985).

A *Sabine Pilot* claim requires that a plaintiff prove that she was discharged for refusing to perform an act for which she would have been exposed to criminal penalties. In response to interrogatories on that point propounded by Respondent IBEW Trust Fund, Petitioner identified Tex. Penal Code § 32.45, as the Texas criminal statute that she would have allegedly violated by processing the loans. The statute provides that

> (b) A person commits an offence if he intentionally, knowingly, or recklessly misapplies property ***he holds as a fiduciary*** . . . in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

(Emphasis added).

In all subsequent amended petitions — including the Third Amended Original Petition, filed on September 27, 1993 (Tr. 910) and the "live" petition at the time of summary judgment — Petitioner continued to articulate her *Sabine Pilot* claim as one in which the Trustees' command that she process the loans in question "subjected [her] to criminal liability for misappropriation ***of fiduciary funds***. . . ." (Emphasis added).

Furthermore, in her First Supplemental Response to Certain Defendants' Motion for Summary Judgment, Petitioner again emphasized that, "under Vernon's Ann. P.C. Sec. 32.45, [she], ***as a fiduciary***, could be prosecuted for misapplication of ***fiduciary*** property." (Tr. Doc. 37) (emphasis added). Her response went on to point out that the Texas statute deals with misapplication of property held by anyone "***as a fiduciary***." (*Id.*). Finally, her Supplemental Response was supported by her personal affidavit, which contained the following:

> From July 1987 until April 18, 1989, the date of my termination, I functioned as the Administrator of the Pension Fund and Office Manager of the IBEW Pension Trust Office. My official job title was Administrative Agent. As such, ***I was a fiduciary with respect to the funds administered by my employer***. (emphasis added)
>
> . . .
>
> Therefore, if I participated in depletion of the funds by processing unemployment loans to employed members, ***as a fiduciary of the fund***, I would be subject to criminal liability for misappropriating the funds. (emphasis added)
>
> . . .
>
> The trustees refused to provide me with any instructions regarding how to handle the unemployment loan applications of employed applicants, ***thereby exposing me as a fiduciary to the risk of criminal liability for misappropriation of fiduciary funds*** if I participated in disbursing funds from the Plan to persons not entitled to receive the funds. (emphasis added)

(*See* Exhibit A to Tr. Doc. 37).

At no time in the trial court, or in her principal brief articulating her points of error in the court of appeals, did Petitioner argue that she was not a fiduciary under the Plan.

Indeed, her central cause of action has always been premised on the criminal liability to which she was allegedly exposed for improper conduct as a fiduciary — a point not lost on the court of appeals which, in its decision, obviously rejected Petitioner's attempt to repudiate her repeated assertions that she was a plan fiduciary. It is outrageous for her now to imply to this Court that her "non-fiduciary" status is an established fact in this litigation and to further contend, therefore, that the courts below erred in finding that ERISA preempted her claims despite her alleged lack of standing under ERISA. To the contrary, the only possible interpretations of the decisions below are that the Texas appellate courts determined, pursuant to Texas rules governing summary judgment, either that: (1) the evidence — including Petitioner's own admissions — sufficiently established that she was a plan fiduciary and her own factual allegations estopped her from now asserting the opposite; or that (2) she had waived any such argument by her failure to timely make it. In either case, no basis exists for Petitioner's implied premise before this Court that she was not a fiduciary, on which she then attempts to construct issues of "standing" and "prerequisites for preemption" that were never raised below.

Under these circumstances, it is, at best, ironic — and, at worst, grossly disingenuous — for Petitioner now to attempt to rely on decisions of the Ninth Circuit Court of Appeals for the proposition that standing to enforce ERISA is a prerequisite for ERISA preemption. Whether the Ninth Circuit is right or wrong on that point is an interesting, though wholly academic, question herein — in part because the issue was never raised or addressed below and, perhaps more significantly, because even the Ninth Circuit would undoubtedly endorse, rather than reverse, the previous appellate rulings in this case. After all, and as Petitioner well knows, the Ninth Circuit has held, on virtually identical facts, that plaintiffs such as Petitioner do indeed have standing to sue co-fiduciaries under ERISA §§ 502 and 510, 29 U.S.C. §§ 1132 and 1140.

In *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), the plaintiff was a former employee of the trustee of an ERISA profit-sharing plan who claimed, under Hawaiian law, that she had been wrongfully discharged in retaliation for resisting instructions from her employer to make certain allegedly illegal payments from the plan to certain participants. As have the Fifth and Sixth Circuit Courts in similar cases — *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311 (5th Cir. 1994); *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985) — the Ninth Circuit had no difficulty in finding Hashimoto's claim preempted by ERISA, and further held that ERISA's § 510, through the enforcement provisions available to plan fiduciaries under § 502, also empowered her to bring an ERISA enforcement action.

The ironic tautology is thus complete. First, Petitioner has never raised or argued the issue of whether she has standing to sue under ERISA — either as a fiduciary empowered to stop or prevent breaches of fiduciary duties under 29 U.S.C. § 1132(a)(2) or (3) or as an alleged victim of retaliation for opposing such breaches under 29 U.S.C. § 1140. Likewise, and not surprisingly, she has never previously raised or argued the issue of whether standing to sue under ERISA is a prerequisite for ERISA preemption. Nonetheless, she now points this Court to decisions of the Ninth Circuit that appear to require such standing before applying ERISA preemption, while simultaneously disregarding (or rejecting) authority from the same source indicating that she enjoys such standing. Should this Court grant her petition to answer Petitioner's "important question," it would be addressing a doubly-abstract issue — abstract because it has never been raised in, or considered by, the lower courts that have reviewed this matter, and because, regardless of how it might ultimately be answered, it will not alter the application of ERISA preemption to Petitioner's own claims.

## CONCLUSION

This case presents no issue warranting review by this Court. Petitioner's attempted fabrication of such an issue purports to pose a question that was never presented to, or considered by, any of the courts below in this matter. Furthermore, Petitioner cannot direct this Court to any conflicting decisions by it, by any federal court of appeals, or by any state court of last resort on the issue she seeks to raise. In fact, Petitioner's "important question" — whether standing to sue under ERISA is a prerequisite to ERISA preemption — does not even constitute a genuine material issue in controversy, because the application of existing federal decisional law to the undisputed facts of this case indicates that Petitioner had standing to proceed under ERISA. Her Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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